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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 261

ELIZABETH PASCOE CAIN,
Petitioner,

vs.

ALICE COFFROTH HUTSON AND C. MILTON HUTSON.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

ROSSA F. DOWNING,
Counsel for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

The Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia affirming an order of the United States District Court for the District of Columbia dismissing petitioner's complaint.

Matter Involved.

Complaint was filed in the District Court of the United States for the District of Columbia May 10, 1939, (Rec. pp. 1-9; App. 1-8)* for an accounting by respondents of the sum of $12,249.44 collected on a secured loan of $6,800.

* Rec. stands for Record in Court of Appeals and App. for complainant's Appendix.

The case was argued before Groner, C. J., Vinson and Edgerton, J. J., in the United States Court of Appeals for the District of Columbia. This court is composed of six Justices: Messrs. Groner, C. J.; Stevens; Miller; Vinson; Edgerton; and Rutledge. The trial by (3) Justices is without authority of law.

On June 23, 1932, Cecil B. Pascoe, Somerset, Pennsylvania, executed a mortgage on Pennsylvania real estate to respondents to secure $5800 at 6%, one year after date. (Rec. pp. 30-31; App. pp. 19-22.) The mortgagor could pay the sum of $6500 in three months, and satisfy the entire indebtedness. The mortgage further provided:

> "In addition thereto, the mortgagor agrees to pay the mortgagees monthly the sum of $55, beginning one month from the date thereof, and extending to and including the month in which the principal debt is paid. It is understood that these monthly payments are not on account of interest or principal." (Rec. pp. 30; App. pp. 6.)

An attorney's fee of 5% was also provided and collected. The mortgage was collateral to a bond in identical terms (Rec. pp. 34; App. pp. 23). In default for three months, Messrs. Kooser and Courtney, attorneys for respondents, could appear in Court, and without notice to the mortgagor, take judgment against him. At the September term, 1933, in the Court of Common Pleas, Somerset County, Pennsylvania, said attorneys took judgment for the sum of $7752.04. (App. pp. 3) which included 6% interest, 5% attorney fee and three months $55 payments.

Cecil B. Pascoe died intestate May 19, 1933. May 31, 1933, Carrie Zerfoss and Robert Pascoe qualified as administrators in Somerset, but subsequently resigned under pressure on October 11, 1939, (App. pp. 34) and thereafter

the estate was fully administered in Pennsylvania by an administrator d.b.n. Elizabeth Pascoe of Washington, D. C., only heir-at-law of Cecil B. Pascoe, died after Cecil B. Pascoe. Petitioner is her executrix, appointed by the Probate Court of this District. The respondents have collected $12,249.44 in liquidation of this debt over a period from September, 1933, to November 21, 1938. None of this money ever went through the hands of the administrators, but was collected, without protest on the part of the administrators, out of the real estate by Kooser and Courtney, attorneys for respondents. Pascoe was induced by Kooser and Courtney to direct the tenants to pay all the rent to them. (App. pp. 12, Defendant's Answer.)

No Court has held this was not a usurious contract. The trial Court passed the question up (See Exhibit A). The Court of Appeals ignored it in its opinion, but definitely intimated at the hearing that the transaction was usurious (See Exhibit B).

Jurisdiction.

The Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended February 13, 1925 (U. S. C. Title 28, Section 34, and rule 38 of the Revised Rules of the Supreme Court of the United States, p. 32), which reads as follows:

> "Where that Court (United States Court of Appeals for the District of Columbia) has not given proper effect to an applicable decision of this Court." *Hooey* v. *Wilson,* 76 U. S. 504; 19 L. Ed., 762; *Missouri, Kansas and Texas Railway Company,* 226 U. S. 570; 57 L. Ed. 355.

The Court of Appeals also failed to give consideration to Rules 20 and 21 of the Federal Rules of Civil Procedure, and Title 29, Sec. 255 of the D. C. Code, 1929; Title 20,

Sec. 505, 1940, and prior decisions of the D. C. Court of Appeals. *United States Trust Co.* v. *National Savings and Trust Co.,* 37 App. D. C. 296-300; *Lopez* v. *United States,* 82 F. (2d) 982. This case was heard by three Judges out of a full Court of six Judges for which there is no authority in law.

Statement of Case.

The point of decision in this case is sufficiently stated by the expressed ground on which the complaint was dismissed (Opinion of Court of Appeals pp. 12 this petition, Exhibit B) namely that:

> "The Mortgagor's Administrator Was a Necessary Party to This Suit. The Complaint Was Rightly Dismissed."

This decision is in direct opposition to the ruling of this Court in *Hooey* v. *Wilson* (76 U. S. 504; 19 L. Ed. pp. 762), and the case should have been reversed and complainant allowed to amend. This Court said:

> "Jephaniah Jones, the complainant in the suit in which the decree of sale was made and the other heirs-at-law of Anne R. Dermott, are indispensable parties. No relief can be given in the case before us which will not seriously and permanently affect their rights and interests. According to the settled rules of equity jurisprudence the case cannot proceed without their presence before the Court. *The objection was not taken by the defendant, but the Court should, sua sponte,* have caused the bill to be properly amended or have dismissed it if the amendment were not made. Instead of this being done the cause was heard and decided upon its merits. *This was a manifest error.* The decree must therefore be reversed and the case remanded to the Court below. In that Court both parties can take leave to amend and can modify their pleadings so as to exhibit the case

as they may desire respectively to present it. If testimony be necessary, that also can be taken."

Missouri, Kansas and Texas Railway Co. v. *Wulf,* 226 U. S. 570; 57 L. Ed. 355. Where plaintiff is sole beneficiary and takes out letters (of administration) after the commencement of the action, the Court may allow an amendment alleging that the plaintiff sues in the capacity of administrator. This amendment is not equivalent to the commencement of a new action, and is not subject to the statute of limitations because the exchange *was in form rather than in substance.*

In the instant case the petitioner could sue as ancillary administrator, 1940 Code, 20-505, p. 5 this petition.

Bryan v. *Curtis,* 26 App. D. C. 95. "Where an appellate Court finds that an indispensable party whose interests are directly involved has not been made a party to the proceedings, the rule is to reverse and remand the case in order that the defect may be cured."

Citing *Hooey* v. *Wilson, supra,* and *Roberts* v. *Consaul,* 24 App. D. C. 551.

Lopez v. *U. S.,* 82 Fed. (2nd) 982. "The clear weight of authority supports the rule that an amendment changing the capacity in which a plaintiff sues does not change the cause of action so as to let in the defense of limitations."

Motion to Amend.

At the trial due application was made to amend as to parties and the opinion of the Trial Court expressly so states, (See Exhibit A) and the question was urged in the Court of Appeals, but they ignored it. Petitioner's right to amend, if at all necessary, is fully justified under the D. C. Code and Federal Rules.

District Code, Title 29, Section 225; 1940 Title 20-505. Executors and Administrators. It shall be law-

ful for any person or persons to whom letters testamentary or of administration have been granted by the proper authority in any of the United States or the territories thereof to maintain any suit or action, and to prosecute and recover any claim in the District in the same manner as if the letters testamentary or of administration have been granted to such persons or person by the proper authority in the said District; and the letters testamentary or of administration or a copy thereof certified under the seal of the authority granting the same, shall be sufficient evidence to prove the granting thereof and that the persons or person, as the case may be, hath or have administration; *Provided, nevertheless, that the Probate Court of the District shall have the power upon the petition of anyone interested, to require from such person or persons the security required by law in like cases, from a resident administrator or executor, or the said Court may grant auxiliary or ancillary letters, as the case may require to the same or to other persons.*

Rule 21—Rules of Civil Procedure for the District Courts of the United States. Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the Court on motion of any party or on its own initiative, at any stage of the action, and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Rule 20—Rules of Civil Procedure for the District of Courts of the United States. Permissive Joinder of Parties. (a) All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally or in the alternative, in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or

> arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

See also *United States Trust Co.* v. *National Savings and Trust Co.*, 37 App. D. C. 296, 299, allowing an amendment by substitution of parties.

We see no reason why in due course of Justice petitioner could not sue under the Code in both capacities, executor of Elizabeth Pascoe and ancillary administrator of Cecil B. Pascoe, or either.

The Petitioner Is the Proper Party to Bring This Suit.

In order to understand this point a short review of pertinent facts is necessary. Zerfoss and Pascoe were appointed administrators May 31, 1933 in Somerset County, Pennsylvania. Under Pennsylvania Law an account should have been rendered within six months after appointment. After this suit had been filed E. C. Porter, a creditor (App. pp. 6, 42) filed a petition for an accounting. During the intervening years every effort by complainant to procure an accounting was made without success. Finally May 8, 1939, Zerfoss and Pascoe filed a paper called an account (App. 34). Numerous exceptions were filed by petitioner through her own counsel (Rec. p. 44; App. 34). The administrators were unable to support the account, because as they claimed all transactions were had through Joseph Levy, their attorney, and he refused to render an account. The Orphans Court held it had no power to compel Levy to render an account. (See Complaint, App. p. 7.) So

the proceeding was abortive. Interest for five years had already accumulated. Counsel for the administrators had full charge of the proceedings, and unless action was promptly taken the statute of limitations would bar the recovery in a short time. Repeated requests had been made upon the administrators to sue for an accounting from these respondents, but they refused, or at least, failed to do so.

Accordingly on May 10, 1939, this suit was filed in this city because there was no other place in which it could be brought, respondents being residents of the District of Columbia. Limitations would have run May 21, 1939. Inheritance and estate taxes had not been paid. If this suit had not been filed when it was, none could be filed. An attempt to remove the administrators by legal proceedings would have been useless, because there was no time. The administrators Zerfoss and Pascoe filed an inventory and appraisement of personal property amounting to $18,325.78 (App. p. 33). This appraisement was out of all reason and has never been explained. The real estate was appraised at $25,000 (App. p. 33) but sold at $9,300 (App. 38). Failure to except to this appraisement cost the estate $478.28 inheritance tax (Rec. p. 48; App. pp. 39, 40). When this suit was filed Zerfoss and Pascoe were still administrators, so petitioner made them defendants. Naturally being hostile and in default they could not be plaintiffs and made no effort to appear. Their attorney over whom petitioner had no control has not seen fit to help, but after this cause had been begun, filed a proceeding to open the original judgment of $7,752.04 taken in Pennsylvania, but finally abandoned it and it was marked "Concluded" (Rec. p. 37; App. 30). Petitioner's counsel thinks this action simply fantastic, and could only be intended to hamper this case. Whatever illegal interest was included in that judgment was merged in the judgment. What petitioner wants is

illegal interest collected since the judgment. The surety company was made a party defendant to this case and process had upon it, but the trial court sustained a motion to dismiss as to it. The administrators could not be forced to take part here, so nothing could be done as to them. Clearly if this suit was not filed here there was an end to it. After this suit had been filed the court and counsel, including petitioner's counsel, and the surety company, in order to pay the debts and save further expense agreed to submit the whole case to the Orphans Court for some compromise, sell the real estate, pay off all debts and close the estate. This suit with the knowledge of all was then pending. One of the conditions of the compromise was that the administrators resign without compensation, and the County Trust Co. be appointed administrator d. b. n. (See proceedings pp. 32-46 Complainant's App.; Rec. pp. 39 *et seq.*). The real estate was sold, every debt with interest was paid and $5,202.63 turned over to petitioner, and the estate in Pennsylvania closed. (See certificate of Kooser and Courtney *et al.*, App. 43; Rec. p. 52.) Counsel for respondents not only ratified this course, but before they would release the mortgage, bond and judgment of record in order that the real estate may be sold demanded $210.56 more as a part of their claim although they had collected $12,249.44. This amount was paid, December 7, 1939, under protest; really under duress (Rec. pp. 18, 19; App. pp. 8, 10). A payment was also collected out of the rents and applied to this alleged debt January 14, 1939 (App. p. 46) after this suit was filed. It is significant that up to December 7, 1939 they still exacted illegal tribute from the dead Pascoe.

Under these circumstances suit by petitioner was legally justified and mandatory. The Court of Appeals says in its opinion:

> "Under the laws of both the District of Columbia and Pennsylvania the mortgagor's administrator was a necessary party to this suit."

Probably meant an indispenasble party.

In support the appellate court cites, D. C. Code, Title 20, Sec. 501 (1940):

> "Executors and administrators have power to commence and prosecute any personal action at law or in equity which the testator or intestate might have commenced and prosecuted."

The law of Pennsylvania is to the same effect also cited by the Court of Appeals, Perdon's Stat. Ann., 1930, Title 20, Sec. 772 (As amended July 2, 1937) P. L. 2755, Sec. 2 (See Respondents App. p. 1). These statutes extend the right of executors and administrators to bring actions, real and personal, which they did not have before, but in no wise alters the law, so as to exclude heirs-at-law or others where properly they could sue. In fact, the Court of Appeals has decided to the contrary in *United States Trust Co.* v. *National Savings & Trust Co.*, 37 App. D. C. 296-300.

> "Undoubtedly the estate of decendent descends to his heirs at his death, subject to the claims of creditors and the laws in force for administering it. But if there be no debts, and no distribution needed, and only a solitary heir administration would seem to be useless. In this case I see no reason why the heir may not assert her rights." (This quotation by the Court of Appeals is from McLean *v.* Wade, 53 Pa. 146).

The Court of Appeals said:

> "No reason is apparent why an ancillary administrator appointed more than a third of a century after death of the testator should intervene to prosecute this action *when its only duty in case of recovery would be to turn the proceeds over to the cestui que trust.*"

Buchanan v. *Buchanan*, 71 At. 745, 75 N. J. Eq. 274, 22 L. R. A., N. S. 454-463, is the leading case on the subject, and while it holds it is the general rule that personal rep-

resentative is the proper party to bring any suit in behalf of the deceased or his estate, yet it says:

> "That the persons interested in the estate of the testator not being the legal personal representatives will not be allowed to sue persons possessed of assets belonging to the testator unless it is satisfactorily made out that there exists assets which might be recovered, and *which but for such suit would probably be lost to the estate.* * * * On the same principle that permits a cestui que trust to maintain actions which his trustee should bring when the latter neglects or refuses to bring them, the only exception to the rule above stated arises, when, although there is an administrator, he *neglects or refuses to prosecute suits for the recovery of the decedent's estate. In such case the next of kin may sue to recover the property joining the personal representative as a party defendant.*"

In 22 L. R. A. N. S., 454-460, there is a note to *Buchanan* v. *Buchanan,* which discusses this question exhaustively. We respectfully invite the Court's attention to the following excerpts:

> "Page 457. There is a recognized exception to the general rule, 'where it affirmatively appears that there are no debts or claims of any kind against the estate, and there will be nothing for an administrator to do but collect the claim sued on, and pay it over to those legally entitled to it. In such a case, administration is deemed not only a useless ceremony, but also a diminishing one.' " (This is the situation in the case at bar and was so at time of trial. Any money collected must be immediately turned over to this petitioner.)

22 L. R. A. N. S. 458, The heir-at-law may sue

> "upon the ground that there is no necessity for subjecting the next of kin to the expense, hazard and delay or administration where *all the administrator would have to do would be to receive with one hand and distribute with the other.*"

22 L. R. A. N. S. 458:

> *"Where it appeared that the administrator refused to sue."*

22 L. R. A. N. S. 461:

> *"Where that administrator neglects or refuses to prosecute suit for the recovery of his decedent's estate."*

21 Am. Jur. Sec. 1003 p. 940:

> "Although ordinarily the administrator alone can sue with respect to the personal property of the decedents, heirs, next of kin and legatees and distributees are entitled to maintain such actions in their own names. * * * where he (the administrator) is *unwilling or fails or refuses to act.*"

21 Am. Jur Sec. 1002-6 p. 939:

> "After the administration has been closed and the decedent's debts have been paid the distributees are ordinarily accorded the right of suit incident to ownership."

Errors.

From the foregoing it is clear that the Court of Appeals erred in not reversing this case and sending it back to the Trial Court for amendment; or

In holding that the executrix of the heir-at-law and next of kin of Cecil B. Pascoe under the circumstances disclosed in this record could not bring the suit.

Trial by Three Justices Unauthorized in Law.

This question has harassed the members of the bar of the District of Columbia ever since the Act of May 31, 1938; 52 Stat. p. 290, Sec. 2 enlarging the Court to six members.

This objection is now before the United States Supreme Court in Case No. 1287, *Dorothy K. Knost* v. *Donald Mac-*

Millan, October Term, 1942, upon which we rely and respectfully call your attention to the petition filed therein for our authority and reasons in this case.

We also cite an article in June 1942 issue of the Journal of the Bar Association of the District of Columbia, p. 235 by Charles Pergler, Dean of National University Law School; Member of the District of Columbia Bar.

Respectfully submitted,

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